88-393

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

TEAM, INC. and LEAK REPAIRS, INC.,

Petitioners,

v.

JONATHAN OVERSTREET, KOPPL COMPANY, M. DOUGLAS COKER, and KOPPL INDUSTRIAL SYSTEMS,

Respondents.

TEAM, INC. and LEAK REPAIRS, INC.,

Petitioners,

v.

JOHN A. EDMON, KOPPL COMPANY, M. DOUGLAS COKER, and KOPPL INDUSTRIAL SYSTEMS,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether, upon motion for summary judgment, a non-moving party who has the burden of proof on an issue at trial is required to pre-prove its case to the district court judge prior to trial, or does the non-moving party need only present sufficient evidence showing a factual dispute on the issue to require the factfinder to resolve the differing versions?

PARTIES TO THE PROCEEDING

Petitioners are Team, Inc. and Leak Repairs, Inc. (collectively referred to as "Team"). Respondents are Jonathan Overstreet, Koppl Company, M. Douglas Coker, Koppl Industrial Systems, and John A. Edmon.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

Petitioners respectfully request that Writ of Certiorari be issued to review the decision in this case of the United States Court of Appeals for the Ninth Circuit. That decision affirmed the decision of the United States District Court for the Central District of California granting summary judgment in favor of Respondents and against Petitioners' claims of trade secret misappropriation and interference with contractual relations.

OPINION BELOW

The decision of the Court of Appeals is contained in an unreported opinion attached hereto as Appendix A. The decisions of the District Court granting summary judgment are attached as Appendices B, C, D and E.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1988. Appendix A. This Court has jurisdiction to review the judgment of the court of appeals by Writ of Certiorari pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioners' appeal to the Court of Appeals and this Petition for Writ of Certiorari allege the erroneous interpretation and application of Rule 56(c) of the Federal Rules of Civil Procedure. Appendix F. Additionally, the new standard applied by the Court of Appeals denies Petitioners' right to a jury trial as provided by the seventh amendment to the United States Constitution. Appendix G.

STATEMENT OF THE CASE

This case involves the blatant theft of trade secrets by former employees and their new employer from the original developer and owner of certain trade secrets involving the sealing of leaks in piping systems while those systems are on-stream and under pressure. Through their unfair competition, the thieves became overnight competitors in a highly technical and dangerous field of endeavor. They interfered with contractual relations, breached contractual fiduciary obligations, and spread part of the stolen information in an

effort to make it appear that it was common knowledge in the industry.

In 1984, Team, Inc. and its wholly owned subsidiary, Leak Repairs, Inc. (hereinafter referred to jointly as "Team" or as "Petitioners"), commenced two separate diversity proceedings in federal court against two of their former employees and their new employer. For reasons of venue, one action was commenced in the Central District of California and the other action was commenced in the Northern District of California. The two cases were subsequently consolidated in the Central District of California.

On November 17, 1986, January 5, 1987, and April 27, 1987, the Respondents filed successive motions for summary judgment. The first two motions were directed at Team's trade secrets, focusing on thirteen of the various techniques, as well as hardware, sealants, and customer lists. The third motion was directed at other causes of action. Despite vigorous opposition, and the existence of numerous credibility issues and material issues of fact, the district court granted all three of Respondents' motions for summary judgment, and denied a motion for reconsideration.

On June 21, 1988, the court of appeals affirmed the district court's grant of summary judgment. The court, in its de novo review, set forth a new standard for summary judgment, requiring the non-moving party to establish facts to the satisfaction of the trial judge in a conclusive fashion, rather than simply requiring the non-moving party to present evidence demonstrating a genuine dispute of material fact. This new standard allowed, if not required, the trial judge and the court of appeals to engage in weighing the evidence and resolving credibility issues and material fact issues. The burden placed on the non-movants was therefore much greater than allowed by Rule 56 of the Federal Rules of Civil Procedure and this Court's interpretation of that rule.

The court held that "[t]he lack of secrecy defeats Team's claim," and boldly accepted Respondents' contention that "secrecy was not established by Team. The procedures and hardware were commonly known in the industry and by the employees of Team." Appendix A at 4a. The applicable substantive law, however, establishes that the question of whether adequate secrecy was maintained is a question for the jury to determine by weighing many facts, as well as credibility of witnesses. *See* discussion at pages 8-11, *infra.* Indeed, the evidence presented by the parties was clearly not so one-sided as to warrant summary judgment.

Team presented evidence of written agreements with both its employees and customers not to disclose its trade secrets, and also presented evidence that its trade secrets were not commonly known in the industry. The Court nevertheless determined that Team had publicly disclosed its trade secrets because "Team's process of leak repairing was done openly at its plant and at the customers' plant. The hardware was often left at the customers' plants." Appendix A at 4a-5a. The Court ignored the fact that no evidence was presented to show that any customers had violated their nondisclosure agreements by releasing Team's trade secrets, or that anyone had ever obtained knowledge of Team's trade secrets by infiltrating security at customer's plants so as to steal the technology.

The contradiction between the evidence presented by Team and by Respondents demonstrates, at the very least, that this is not a case for which summary judgment lies. Moreover, the diametric contradiction between the court's conclusion and the evidence presented demonstrates (1) a completely new summary judgment standard and (2) a misapplication of the standard articulated by this Court.

REASONS FOR GRANTING THE WRIT

The decision below warrants review because it is in sharp conflict with the standard established by this Court.

1. The court of appeals' decision requires a plaintiff whose claim is attacked by a motion for summary judgment

to engage in two trials: first, to convince the trial court judge, as if he were the trier of fact, of the claims presented; then, once again to present those claims to the jury. By requiring the non-moving party to establish the existence of facts on an issue prior to trial, rather than merely presenting evidence of a factual dispute, the court of appeals imposes a much higher burden on the non-movant than is required under this Court's interpretation of the standard set forth in Rule 56 of the Federal Rules of Civil Procedure. That standard requires only that the non-movant present sufficient evidence showing a factual dispute on the issue to require the factfinder to resolve the differing versions. In other words, it contemplates summary judgment only in cases where the court may, without weighing the evidence, determine that there is an absence of any material fact dispute. The application of the court of appeals' standard, by contrast, will routinely result in the trial judge encroaching on the province of the jury by weighing the evidence and resolving credibility issues and material fact issues. This case presents the Court with the opportunity to resolve the question of what evidentiary showing is sufficient in the procedural context of an ordinary civil action where the burden of proof at trial is by a preponderance of the evidence and where the non-moving party presents evidence of a factual dispute. Recent treatment of the summary judgment issue by this Court has only addressed actions in which the movant presents no evidence to support the motion *(Celotex Corp. v. Catrett,* 477 U.S. 317 (1986)) and in which the evidentiary standard exceeds the ordinary preponderence requirement *(Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986) and *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986)). Review of this critical question in the procedural context of this case will enable the Court to render guidance that will both promote efficiency and conserve judicial resources in this often-traversed area of law.

2. The decision of the court of appeals in this case so far departs from the standard for summary judgment set forth

by this Court as to call for the exercise of this Court's power of supervision.

3. The court of appeals' revision of the standard for summary judgment is an impermissible deprivation of Petitioners' right to a jury trial. To require the non-moving party to establish certain facts to the satisfaction of the trial judge prior to jury consideration vitiates this constitutional right because it precludes the jury from considering, weighing and deciding which witnesses should be believed, and which facts are established.

ARGUMENT

I

APPLICABLE LAW AND STANDARDS

A. *Summary Judgment Standard*

The general rule governing summary judgment is well known: Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248. Put another way, if the non-moving party submits evidence showing the possibility of the existence of certain facts from which it would be open to a jury to infer from the circumstances that the complained-of wrong occurred, then there is a genuine issue. *Anderson*, 477 U.S. at 249. "If reasonable minds could differ as to the import of the evidence," the dispute is genuine. *Anderson*, at 250. A disputed fact is material if, under the applicable substantive law, its resolution might affect the outcome of the suit. *Anderson*,

at 248. That is, factual disputes that are irrelevant or unnecessary to the outcome of the suit will not be considered. *Id.*

Thus, the question to be resolved at the summary judgment stage is whether there is any evidence upon which a jury could properly proceed to a verdict in favor of the non-moving party, not whether the evidence conclusively establishes the claim of the non-movant:

> [T]he issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.

Anderson, at 248-249, (quoting First National Bank of Arizona v. Cities Service Company, 391 U.S. 253, 288-289).

Although the non-moving party cannot rest on the pleadings in opposing the motion, the court nonetheless should consider those too, as in a motion for a directed verdict. Fed. R. Civ. P. 56(c). This is particularly true where, as here, the complaint was verified by a fact witness. The court "must interpret the entire record in the light most favorable to [the non-movant] and give to it the benefit of all inferences which the evidence fairly supports, even though contrary inferences may reasonably be drawn." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 604 (1985).

It is clear that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson,* 477 U.S. at 249. In carrying out this function, the judge is to believe the evidence of the non-movant and draw all justifiable inferences in his favor. *Anderson,* at 255. Recently, this Court staunchly reemphasized that "the plaintiff, to survive the [summary judgment] motion, need only *present evidence* from which a

jury *might* return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." *Anderson,* at 258 (emphasis added). In other words, summary judgment is proper only when the truth is clear, when the basic facts are undisputed, and when the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts. *Crystal City v. Del Monte Corp.,* 463 F.2d 976, 981 (5th Cir.), *cert. denied,* 409 U.S. 1023 (1972).

B. *Substantive Law Issue*

The substantive law issue in dispute can be narrowed to the question of whether Team maintained sufficient secrecy as to its techniques, processes, and hardware to warrant trade secret protection. The Respondents admitted that if trade secrets existed as alleged, then Petitioners were entitled to trial on the merits. (Court of appeals' record Tab [hereinafter "Tab"] 134 p.4). Indeed, the district court focused on the secrecy element in formulating its opinion that there were no trade secrets. Appendices B, C and D. Likewise, the court of appeals' unreported opinion states: "[T]he lack of secrecy defeats Team's claim." Appendix A at 4a.

1. *Defining A Trade Secret*

The substantive law of California applies to this case. Under California law

> [a] trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

Rigging Int'l Maint. Co. v. Gwin, 128 Cal. App. 3d 594, 180 Cal. Rptr. 451, 217 U.S.P.Q. 378, 384 (1982); *Maxwell Alarm Screen Mfg. v. Protective Serv. Corp.,* 218 U.S.P.Q. 580, 581 (C.D. Cal. 1982); *Restatement of Torts* § 757 (1939). That which is common knowledge in an industry is, by definition,

not secret, and therefore cannot be protected as a trade secret. *Clark v. Bunker,* 453 F.2d 1006, 1009 (9th Cir. 1972).

California law also recognizes that "the nature of trade secrets is somewhat nebulous." *Rigging Int'l Maint. Co.,* 217 U.S.P.Q. at 384; *see also Restatement of Torts* § 757. Consistent with this legal principle, commentator Roger M. Milgrim, in his extensive treatise on trade secrets, observes:

> Trade secret litigation often requires a plaintiff to build his case on circumstantial evidence, putting the trier of fact in the weighty position of trying to determine what probably happened. . . . Essentially, the issue of trade secrecy is one in which the trier of fact must test rather elusive and difficult concepts against the evidence.

12A *Business Organizations, Milgrim on Trade Secrets* § 7.07[1], at 7-136 and 7-137 (1988).

2. *The Relative Secrecy Doctrine*

Absolute secrecy is not necessary in order to establish that a trade secret exists and to hold the wrongdoer liable for wrongful appropriation of trade secrets. *See, e.g., Digital Dev. Corp. v. International Memory Sys.,* 185 U.S.P.Q. 136, 141 (S.D. Cal. 1973) (the "unsecret conduct" of manufacturing at a plant does not destroy trade secret elements of the product). The owner of a trade secret is only required to maintain what is commonly termed "relative secrecy," which requires "only a substantial element of secrecy." *Tri-Tron Int'l v. Velto,* 525 F.2d 432, 436 (9th Cir. 1975) (also recognizing that California has adopted the Restatement of Torts § 757 as the applicable law of the state). A substantial element of secrecy is defined as protection "such that except by the use of improper means, there would be difficulty in acquiring the information." *Clark v. Bunker,* 453 F.2d 1006, 1009 (9th Cir. 1972). Secrecy is not lost if the holder of a trade secret reveals it to another in confidence and under an implied obligation not to use or disclose it. *Restatement of*

Torts § 757 comment b (1939); *Clark v. Bunker,* 453 F.2d 1006 (9th Cir. 1972); *Kewanee Oil Co. v. Bicron Corp.* 416 U.S. 470 (1974); *accord Metallurgical Indus., Inc. v. Fourtek,* 790 F.2d 1195 (5th Cir. 1986); *see also Plant Indus., Inc. v. Coleman,* 287 F. Supp. 636, 159 U.S.P.Q. 651 (C.D. Cal. 1968). If the owner of a trade secret can show evidence of a confidential relationship between it and its *customers,* secrecy is *not* lost. *Futurecraft Corp. v. Clary Corp.,* 23 Cal. Rptr. 198, 205, 205 Cal. App. 2d 281 (1962). Similarly, a manufacturer was held to have sufficiently safeguarded the secrecy of its designs where it followed the industry practice of merely stamping a proprietary legend on instruction manuals which accompanied equipment purchased by its customers. This mere implication of confidentiality was sufficient to protect the trade secret. *Digital Dev. Corp.,* 185 U.S.P.Q. at 140.

Just as a jury must decide the reasonableness of a party's action in other types of cases, so must a jury decide if the efforts taken by Petitioners to protect their trade secrets were reasonably sufficient to maintain the protected status. "The issue of whether such degree of secrecy exists in a particular case is [a question] of fact, rather than of law." *Tri-Tron Int'l,* 525 F.2d at 436; *Clark v. Bunker,* 453 F.2d at 1010; *K-2 Ski Co. v. Head Ski Co.,* 506 F.2d 471, 473 (9th Cir. 1974) (jury is to consider the entirety of the circumstances). The holder of a trade secret "may, without losing his protection, communicate it to employees involved in its use. He may likewise communicate it to others pledged to secrecy." *Restatement of Torts* § 757 comment b (1939). *See also Clark v. Bunker,* 453 F.2d 1006, 1010 (9th Cir. 1972). In *Metallurgical Indus., Inc. v. Fourtek, Inc.,* 790 F.2d 1195 (5th Cir. 1986), the appellate court, applying substantive trade secret law almost identical to that of California, found that (1) the plaintiff's subjective belief that its modifications were unknown in the industry, (2) the efforts by the company to keep the modifications secret, and (3) the company policy of requiring nondisclosure agreements for anyone authorized to

see the device (a furnace) constituted evidence probative of the existence of a secret since the manufacturer would presumably not go to the trouble or expense if it thought its competitors already knew the information. *Id.* at 1199. The court further found that the disclosures, involving business transactions, were limited disclosures. The court noted:

> [The plaintiff's] case would have been stronger had it also presented evidence of confidential relationships with these two [customer] companies, but we are unwilling to regard this failure as conclusively disproving the limited nature of the disclosures. . . . Whether a disclosure is limited is an issue the resolution of which depends on weighing many facts.

Id. at 1200. An *inference* the court found from the above facts was that plaintiff "wished only to profit from its secrets in its business dealings, not to reveal its secrets to the public." *Id.* at 1201. Team presented summary judgment evidence showing it has spent millions of dollars developing and protecting its trade secrets. It too would not do this if it thought its competitors already knew its trade secrets.

II

THE COURT OF APPEALS ERRED IN PLACING TOO GREAT A BURDEN ON THE NON-MOVING PARTY

The issue to be resolved is whether, in response to a motion for summary judgment, a non-moving party who has the burden of proof on an issue at trial is required to preprove its case to the district court judge prior to trial, or simply to present evidence which demonstrates a genuine dispute as to a material fact. The new standard that the court of appeals stated and applied in this case amounts to reversible error. Under the court of appeals' formulation of the standard, summary judgment imposes a burden on a nonmovant to prove a claim conclusively. In its expression of and application of that standard, the court of appeals

impermissibly broadened the scope of its review of the evidence presented to include weighing the evidence, even though its authority is confined to an objective review which will answer the only essential question on summary judgment: Is there a genuine dispute of material fact? This objective review of the evidence constitutes the very heart of the summary judgment concept. Rather than requiring proof of a fact, such as would be required at trial, the non-movant need only present evidence which demonstrates a dispute as to the material fact. Team met this burden of proof by presenting the evidence delineated *infra;* the court of appeals, however, held Team to a higher burden—out of place in a summary judgment analysis—and thus rendered an erroneous summary adjudication.

The standard applied by the court of appeals was that the non-movant "had the burden of *establishing the existence* of any facts upon which the jury reasonably could conclude that there were some trade secrets." Appendix A at 4a (emphasis added). That stated standard is fundamentally different from this Court's standard which requires the non-movant simply to "*present evidence* from which a jury *might* return a verdict in his favor." *Anderson,* 477 U.S. at 257 (emphasis added). These two standards may appear to be similar on the surface, but a careful comparison reveals a fundamental difference which becomes glaringly evident in application. The court of appeals' standard required the Petitioners to *prove* the existence of facts to support a verdict rather than merely to present evidence that could support a verdict, or simply to present evidence that would demonstrate a genuine dispute as to those facts.

This new standard was applied so as to require facts to be *established* beyond merely showing a dispute of those facts. This is clear when excerpts from the court of appeals' opinion are compared to the evidence presented in the summary judgment hearings. The evidence presented by Petitioners is sufficient, on its face, to show a genuine factual dispute

regarding the key issue—secrecy—both as to the claim of common knowledge and the contention that the processes and techniques were performed openly. The following examples demonstrate that the court of appeals, in the face of this evidence, held Petitioners to a standard clearly exceeding Rule 56(c)'s requirement to show a genuine dispute of material fact:

(a) "The procedures and hardware [of Petitioners] were commonly known in the industry and by the employees of Team."

"Team's process of leak repairing was done openly at its plant and at the customer's plant." Appendix A at 4a.

EVIDENCE PRESENTED BY PETITIONERS:

(1) Team provided testimony showing detailed descriptions of the thirteen techniques and items of hardware at issue and that they were *unknown* in the industry and were qualitatively unlike the purportedly related or identical methods of other companies besides Koppl. (Tab 127, pp. 43-50, 84-85; Tab 160, pp. 39-56, 284, 309-314, 359-360; Tab 170, pp. 7-9).

(2) Third party witnesses of Respondents testified that different leak sealing companies repair leaks in different ways. (Tab 127, pp. 81-85, 89, 92, 95).

(3) Evidence that the external appearance of the hardware does not disclose the internal design. (Tab 160, pp. 52-56).

(4) Team presented specific summary judgment evidence showing the precautions taken by Team to protect the sanctity of its trade secrets such as use of confidential price quotations clearly marked as such; marking its training manuals, sales manuals and similar items as confidential. (Tab 160, pp. 39-41, 288-298).

(5) Evidence that Team required its employees to sign employment agreements containing covenants not to use or disclose its trade secrets, confidential or proprietary information except for the

purpose of carrying out their employment with Team. (Tab 48, pp. 4-10; Tab 143, pp. 30-31; Tab 160, pp. 40, 288, 290, 292-297; Tab 170, pp. 3-4, 8).

(6) Testimony that Team required its customers to execute nondisclosure agreements which specifically provided that the customer agreed not to use or disclose Team's proprietary techniques and processes. (Tab 160, p. 40; Tab 143 p. 30).

(7) Team presented evidence that the application of its hardware at the customer's plants was done under the protection of nondisclosure agreements with the customers. (Tab 160, pp. 40, 363; Tab 143, p. 30; Tab 170, p. 3).

(8) Specific evidence showing that the hardware was not on public display, but instead was on the customers' properties protected by confidentiality agreements with the customers. (Tab 143, pp. 30-31; Tab 160, pp. 40, 288-290, 292-300; Tab 170, pp. 3-4, 8).

(b) "Team fails to demonstrate to this court that its customer lists were trade secrets at all . . . ." Appendix A at 5a.

EVIDENCE PRESENTED BY PETITIONERS:

1. Direct evidence that Team spent several years developing leak repair clientele and assembling information and data concerning each customer's needs, work ordinarily required, work previously required, title and name of point of contact within customer's organization responsible for contracting for leak repair services; direct evidence of the economic advantage such information gives Team over its competitors; and evidence regarding the use of nondisclosure agreements with employees and others who may, in the ordinary course of business, gain access to that information. (Tab 143, pp. 30-32; Tab 147, pp. 23-27).

2. Direct evidence, by affidavit, of time needed to acquire names and develop relationships with

leak sealing customers and that the customer lists identify the economic value of each customer to Team. (Tab 147, pp. 23-27).

3. Testimony that one of the Respondents was unable to acquire business with a particular customer corporation because of the lack of the relevant customer contacts. (Tab 149, p. 278-282).

4. Testimony that Team's customer lists are not believed to be available anywhere else in the industry. (Tab 147, pp. 24-26).

(c) "It is logical that Koppl derived its leak repair customer lists from customers it serviced previously in the industry." Appendix A at 5a.

EVIDENCE PRESENTED BY PETITIONERS:

1. Evidence that in 1983, two of Team's former key employees, Overstreet and Edmon, joined Respondent Koppl, which to that date had not engaged in leak repair business. (Tab 160, pp. 355, 357-358).

2. Evidence that Overstreet, after going to work for Koppl, solicited three other existing employees of Team who subsequently left Team and became employed by Koppl. (Tab 160, pp. 355-356).

3. Testimony that Respondent Koppl and its owner Coker lacked any knowledge about the leak sealing industry prior to hiring Overstreet and Edmon away from Team. (Tab 160, p. 357).

4. Evidence that the court's assumption that Koppl derived its customer base for leak sealing from its hot tapping and line stoppling business is not logical because the contact person for hot tapping and line stoppling is typically not the same as the contact person for leak repair work; and that even for customers for whom one may perform hot tapping and line stoppling, it is still not generally possible to commence the sophisticated variety of leak repair work done by Team, immediately. (Tab 143, pp. 31-32; Tab 147, pp. 23-27).

5. Evidence that the Respondents became overnight competitors of Team; and that such overnight

competition can only be explained by the fact that Overstreet and Edmon improperly used the knowledge gained while they were employees of Team to bypass the time and effort ordinarily necessary to obtain leak repair work independently. (Tab 143, pp. 31-32; Tab 147, pp. 23-27).

6. Evidence that it is highly improbable in the leak repair business that a leak repair company can obtain a customer by having one of its representatives pick up a directory and make a call to the number for a given company and be put immediately into contact with the person who can let a contract for leak repair. (Tab 147, p. 26).

The evidence Petitioners presented in response to Respondents' motions for summary judgment demonstrates that there are triable issues of material fact. The above comparison of this evidence to the findings by the lower court sharply demonstrates that Petitioners were held to a wholly improper burden on summary judgment. Here, the direct evidence produced by the non-moving party squarely conflicted with the evidence produced by the moving party and the conclusion reached by the lower court.

III

THE COURT OF APPEALS ENGAGED IN AN IMPROPER WEIGHING OF EVIDENCE

The court of appeals impermissibly engaged in weighing the evidence presented on summary judgment. This is vividly demonstrated by the court's having upheld summary judgment on the basis that Petitioners' processes and techniques are commonly known in the industry and are performed openly, and thus are not to be accorded protection—despite evidence squarely controverting these points. Petitioners presented direct evidence, as set forth above, that their trade secrets are not common knowledge. Because

the Petitioners' direct evidence completely contradicts the Respondents' evidence, the question of common knowledge was sufficiently in dispute to require submission to a jury. The court's conclusion in favor of the Respondents can only be explained by the court having gone beyond the determination of a disputed fact issue, by stepping into the shoes of the jury, weighing the evidence, and deciding the disputed matter.

Petitioners also presented evidence, as set forth above, of agreements with their customers to maintain the confidentiality of their secret techniques and processes. These confidentiality agreements necessarily extended to the employees of the customers. The evidence concerning people who viewed the Petitioners' techniques and processes shows only that these individuals were either Team employees or customers, who in either case were pledged not to disclose Petitioners' trade secrets. Respondents produced no evidence that any of Team's customers had disclosed its trade secrets or even that anyone had ever obtained knowledge of Team's trade secrets by infiltrating security at customer's plants so as to steal the technology. However, even if they had, there would still be a viable question as to whether Team had taken reasonable precautions to protect the trade secrets. *See, e.g., K-2 Ski Co. v. Head Ski Co., Inc.*, 506 F.2d 471 (9th Cir. 1974); *E.I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012 (5th Cir. 1970), *cert. denied*, 400 U.S. 1024 (1971) (liability of competitor for commercial espionage through third party's aerial photography) (cited in K-2 Ski Co. v. Head Ski Co., Inc.). Thus, the conclusion that the repairs were done "openly" is the obvious result of the court having improperly weighed the evidence, and having failed to accept Petitioners' evidence as true and to draw all justifiable inferences in their favor.

The evidence of confidentiality agreements, presented by Petitioners, clearly supports Petitioners' claim that the techniques and processes were not performed openly, but instead under pledges of secrecy. Such a finding by a jury

would clearly affect the result in this case. The court of appeals, however, looked only at Respondents' allegations that the process was performed "openly", and ignored Petitioners' evidence concerning the confidentiality agreements. The obvious inferences were ignored; if the customers adhered to their agreement to maintain the confidentiality of the trade secrets (no evidence to the contrary was presented), then the only way for an outsider to gain access to the trade secrets would be by theft. It is possible that a jury could find that such agreements conferred protection from public disclosure sufficient to maintain trade secret status, and in accordance with the prevailing industry standards. *See Digital Dev. Corp., supra.* Team was improperly denied the opportunity to have this obvious fact issue determined by the jury.

The result the court of appeals reached clearly shows that it usurped the jury's factfinding function. Had the court properly examined Petitioners' evidence and all permissible inferences therefrom in the light most favorable to Petitioners, the court would have reached the only possible conclusion under proper summary judgment analysis: that a genuine issue of material fact existed regarding secrecy.

The following statement in the court of appeals' opinion confirms the court's error: "Nor is the fact that Team had contracts with its employees and customers not to divulge trade secrets significant in light of the fact that there were no trade secrets." Appendix A at 5a. This totally disregards the effect of the highly material fact of Team's secrecy/confidentiality agreements. The existence of secrecy agreements is a critical aspect of the relative secrecy analysis. Without the secrecy agreements, disclosure of the trade secrets might be unprotected, and would only *then* support the conclusion that "Team's process of leak repairing was done openly at its plant and at the customers' plants." With such agreements, however, a factfinder could conclude that the trade secrets were limited disclosures and should be protected.

By recognizing the existence of the secrecy agreements, the court of appeals impeaches its conclusion that the processes and techniques were performed "openly" and therefore destroyed any existing trade secret.

The court examined the "insignificance" of the secrecy agreements independently of the question of whether the items at issue were trade secrets. The court made its finding of no trade secrets based on lack of secrecy. But, as the substantive law points out, confidentiality/non-disclosure agreements are an important factor in determining whether a sufficient degree of secrecy exists to warrant protection as a trade secret. *Futurecraft Corp., supra; Kewanee Oil Co., supra; Restatement of Torts* § 757 comment b (1939).

Accordingly, the confidentiality agreements are part and parcel of the initial determination of whether a trade secret exists. An analysis of the existence of a trade secret requires serious consideration of any confidentiality agreement and its role in defining the trade secret, not a flippant approach which announces that "there is no trade secret, *ergo,* no reason to consider a secrecy agreement."

This misconstruction and misapplication of substantive trade secret law nullifies the summary judgment analysis because it prevented the jury from considering potent evidence of the key factual issue, *i.e.,* whether there was sufficient secrecy maintained in the disclosures of trade secrets.

IV

SUMMARY JUDGMENT IN THIS CASE IMPERMISSIBLY INFRINGES PETITIONERS' RIGHT TO A JURY TRIAL

Summary judgment is not a substitute for trial of disputed fact issues. *Poller v. Columbia Broadcasting Sys., Inc.,* 368 U.S. 464, 467 (1962). By holding Petitioners to an improper burden and by improperly engaging in weighing

the evidence, as delineated above, the court of appeals has misused the summary judgment process. It disposes of disputed fact issues and thus substitutes summary adjudication for trial of those issues—a trial to which Petitioners are entitled under the seventh amendment to the United States Constitution.

As the court observed in *Tippens v. Celotex*, 805 F.2d 949 (11th Cir. 1986): "Summary judgment is such a lethal weapon, depriving a litigant of a trial on the issue, caution must be used to ensure only those cases *devoid of any need for factual determinations* are disposed of by summary judgment." *Id.* at 952-53 (emphasis added); *see also Poller, supra,* at 467 ("purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try"). While summary judgment is a valid mechanism for the resolution of cases involving undisputed facts, it impermissibly infringes the right to a jury trial in cases where the nonmovant presents evidence sufficient to show that there exists a dispute of material fact. This right remains inviolate and cannot be infringed by an analysis like the one in which the court of appeals engaged, which purports to be a proper summary judgment analysis but which in truth creates an impermissible and unauthorized new standard of adjudication. To permit the summary adjudication by the court of appeals to stand would be to sanction that court's erroneous view and application of summary judgment—at the expense of infringing a constitutional right that summary judgment was never intended to touch.

CONCLUSION

The court of appeals has invented an entirely new standard for disposal of cases on summary judgment. This standard signals a dangerous departure from established summary judgment analysis, the purpose of which is to dispose

of clear-cut cases with undisputed facts. It is a standard which expands the court's authority to that of a jury.

In light of the conflicting evidence of the parties, and the conflict between Team's evidence and the court of appeals' conclusion, it is evident that the truth is not clear, the basic material facts are disputed, and the parties are clearly in disagreement as to the factual inferences to be drawn from the evidence. This case is therefore not one for which summary judgment lies.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

TEAM, INC., a Texas corporation, and LEAK REPAIRS, INC., a Texas corporation, *Plaintiffs- Appellants,* v. **JONATHAN OVERSTREET, an individual, KOPPL COMPANY, a California corporation, M. DOUGLAS COKER, an individual and KOPPL INDUSTRIAL SYSTEMS, a California corporation,** *Defendants-Appellees.*	No. 87-6081 D.C. Nos. CV-84-6497-HLH CV-84-7741-HLH
TEAM, INC., a Texas corporation, and LEAK REPAIRS, INC., a Texas corporation, *Plaintiffs-Appellants,* v. **JOHN A. EDMON, an individual, KOPPL COMPANY, a California corporation, M. DOUGLAS COKER, an individual, and KOPPL INDUSTRIAL SYSTEMS, a California corporation.** *Defendants-Appellees.*	MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted May 2, 1988
Pasadena, California

June 21, 1988

Before: HUG, KOZINSKI, and THOMPSON, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

This appeal of a grant of defendants' summary judgment motion involves the question of whether there existed any genuine issue of material fact as to (1) the existence of a trade secret and (2) the allegation of interference with contractual relations; and whether both or either party had met its burden of production for the motion. The two parties are competitors in the leak repair business. The plaintiffs, Team, Inc. and Leak Repairs, Inc. (hereinafter collectively called "Team"), assert that Koppl Company and Koppl Industrial Systems (hereinafter collectively called "Koppl") acquired an unfair advantage over Team by wrongfully procuring trade secrets owned by Team and by enticing away key employees of Team. We conclude that Team did not possess any trade secrets and that there was no interference with contractual relations. We affirm.

DISCUSSION

Fed. R. Civ. P. 56(c) provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Merely because some evidence has been presented by the party with the burden of proof does not warrant a grant of summary judgment; rather, "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 251 (1986) (emphasis in original).

An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. A fact is material if identifiable as such under the substantive law and might affect the outcome of the suit. *Id.* This does not mean that the court weighs the evidence or determines credibility, but that the court can grant summary judgment if only reasonable conclusion can be drawn as to the verdict. *Id.* at 250. The moving party

bears the burden of informing the court of the basis for its summary judgment motion; however, the nonmoving party must make a sufficient showing as to any element essential to its case and on which it will have the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986).

1. *Trade Secrets*

Team contends that Koppl misappropriated Team's trade secrets, thereby becoming an "overnight competitor of Team's" and avoiding the necessary time and money to develop and design highly successful and marketable trade secrets. Team lists these trade secrets as "repair methods, hardware, sealants, customer lists, and written materials relative to sealing leaks on stream and under pressure." Koppl defends on the basis that there were no trade secrets and, in any case, Koppl independently developed all of its procedures and hardware.

This case was in the district court under diversity jurisdiction applying California law, an issue the parties do not contest. California law states that

> a trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device or list of customers.

Sinclair v. Aquarius Electronics, Inc., 42 Cal. App. 3d 216, 221, 116 Cal. Rptr. 654, 658 (Cal. Ct. App. 1974) (emphasis deleted) (citing 4 rest., Torts § 757, com. b (1939)). Although absolute secrecy is not a requirement, there must be a substantial element of secrecy so that unless improper means are employed, it would be difficult for one to obtain the information. 4 Rest., Torts § 757, com. b (1939). The Restatement additionally notes that an exact definition of a trade secret is

not possible. However, there are six factors to consider in determining whether one exists. They are as follows:

> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees of others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id.

Koppl properly informed the district court of the basis for its motion. Because Team would have to prove at trial that its hardware, sealants, information, and customer lists were, in fact, trade secrets, Team had the burden of establishing the existence of any facts upon which the jury reasonably could conclude that there were some trade secrets.

The lack of secrecy defeats Team's claim. As Koppl points out, secrecy was not established by Team. The procedures and hardware were commonly known in the industry and by the employees of Team. Team asserts that it guarded the secrecy of its trade secrets. For example, Team had employment contracts with its employees, which required the employees not to divulge any trade secrets without permission. The contracts, however, did not define what those trade secrets were.

Team also asserts that contracts with customers required that they keep the trade secrets secret. Team presented evidence that its offers to customers to repair leaks generally stated that the customer should not reveal any "proprietary techniques and processes," and the offers identified sealants and packings (pumps, valves, etc.) as having a "proprietary and trade secret nature." Team also presented evidence that these offers were usually accepted with only minor changes.

However, Team's process of leak repairing was done openly at its plant and at the customer's plant. The hardware

was often left at the customer's plants. As a matter of fact, Team even had on its customer invoice an additional charge for hardware not returned.

Additionally, Koppl produced other evidence which established that it independently developed its own methods and customer lists. For example, in 1982, before Koppl hired any of Team's employees, Koppl first started developing and marketing a sealant. Koppl's and Team's sealants were tested by an independent laboratory, which determined that the two sealants were dissimilar. As to the customer lists, Koppl had been in the business for over 50 years. Koppl already had its own customer lists. It is logical that Koppl derived its leak repair customer lists from customers it serviced previously in the industry. Further, Team fails to demonstrate to this court that its customer lists were trade secrets at all or that Koppl acquired its customer lists from Team.

Since Team did not establish that any trade secrets to which it had a right of protection existed, Koppl could not have misappropriated them. Nor is the fact that Team had contracts with its employees and customers not to divulge trade secrets significant in light of the fact that there were no trade secrets. A jury could only come to the one reasonable conclusion that Team had not established an essential element of its case—that any trade secrets existed.

2. *Interference with Contractual Relations*

Team contends that Koppl improperly solicited employees from Team to come to work at Koppl. As the district court stated, the issue boiled down to "whether Koppl may approach plaintiffs' employees and offer jobs while those employees still work for plaintiffs." The district court basically found that although some disputed facts existed, these facts, seen in the light most favorable to Team, would fail to support its claim or affect the outcome of the case; thus, these facts were not material. Summary judgment was properly granted on this issue.

We have reviewed and reject plaintiffs' other arguments. AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos. CV 84-6497 HLH
and CV 84-7741 HLH

TEAM, INC., et al.

Petitioners

v.

JONATHAN OVERSTREET, et al.

Respondents

November 17, 1986

PROCEEDINGS:

Defendants' Motion for Summary Judgment, Plaintiffs' Motion for Sanctions and for and Order to Show Cause re: Contempt, Plaintiffs' Motion to Strike.

ORDER (also, if applicable, findings and memorandum opinion):

The motion for sanctions or to hold defendants in contempt is denied. The motion to strike from certain declarations is denied. The motion for summary judgment is denied; however, there is established as without substantial controversy items 1 through 7, and 10 through 13. The motion is denied as to item 8 (customer list) and 9 (sealant formula).

The court can see little similiarity between defendant's manual and the revealed material. It therefore credits defendants evidence that the revealed material was not copied and remained with defendants' attorney.

The foundation for the exhibits to the declarations has now been laid.

The formula for plaintiff's sealant could be a trade secret; there is no evidence one way or another as to whether it is and there is no evidence either way as to whether defendant is using it. As to the customer list, there is an issue of fact as to whether it is a trade secret and as to whether defendant used it.

Patented items could not be trade secrets and this is not a patent infringement suit. Hardware sold to customers as a part of plaintiff's service, and kept by the customer, free for anyone to observe, measure, and copy are not trade secrets. In addition, the basic techniques have been used and known for years, as shown by the patents and by the declarations. Expertise, which plaintiff obviously has, is vastly different from a protectible trade secret. If anyone knowledgeable in the business can observe what has been done, and retrieve the hardware from the pipe, valve, or junk yard, no trade secret can exist.

Since there are other issues in the case aside from the allegation that trade secrets have been appropriated as specified, summary judgment cannot be granted on the case as a whole. However, the issues are obviously considerably narrowed.

The reference to item numbers set forth above is to incorporate by reference the items from the defendant's [sic] Statement of Uncontroverted Facts and Conclusions of Law. No further or more formal order is needed.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos. CV 84-6497 HLH
and CV 84-7741 HLH

TEAM, INC. & LEAK REPAIRS, INC.

Petitioners

v.

OVERSTREET, KOPPL CO., COKER & KOPPL INDUSTRIAL SYSTEMS

Respondents

February 2, 1987

PROCEEDINGS:

Defendants' Motion for Summary Judgment; Plaintiffs' Motion for Reconsideration, or, in the alternative, for Certification of Order for Appeal

ORDER (also, if applicable, findings and memorandum opinion):

The defendant's [sic] motion for summary judgment is granted in part as to all issues except the claim for interference with the employment contract.

The plaintiff's [sic] motion for reconsideration of the order for summary adjudication of certain issues is denied.

The motion for certification of the previous order for an interlocutory appeal is denied.

As to the motion for reconsideration, plaintiff does not comply with the requirements of Local Rule 7.16. Even if

that defect were overcome, plaintiff does not meet the heart of the Court's reasoning on the previous motion. Plaintiff has developed obvious expertise in its business, but when it sells its hardware to its customers, free for them or anyone else to copy, the hardware cannot be a trade secret. When it applies the hardware in full view of the customer or anyone else at the customer's plant, or later disassembly can easily reveal the techniques of assembly, then the techniques cannot be a trade secret. Plaintiff says it has certain agreements with some or all of its customers to keep what the customer learns "confidential." There is no claim that all customers are so bound or that the agreement is at all enforced. Even so, plaintiff argues that he can keep a trade secret if it uses reasonable efforts to maintain them as secrets, and argues that the agreements with certain customers comply. The Court does not agree. At that point, the hardware and the techniques are no longer trade secrets because they are not secrets which are kept from anyone except with the violation of duty, fiduciary or otherwise.

As to defendant's motion, plaintiff must show (*see Celotex* (1986) 91 L.Ed.2d 265) that it has enough evidence to make a triable issue of fact on three items: 1) That the sealant or customer list is, in fact, a trade secret; 2) that defendants have knowledge of it; and 3) that defendants used it.

As to both the sealant and the customer list, there is evidence which might support a finding that a trade secret existed. But, there is no evidence at all in either case that defendants possessed or used the trade secret. Defendants deny that they took or used any customers lists (secret or not), describe how they made their own contacts starting with Koppl's lists, and convincingly show that the names and addresses of various customers are in any event listed in industry directories, including contact references noted in the directories.

As to the sealant, defendants deny that they know even today what plaintiff's formulas are, and, of course deny that

they use plaintiff's formula, whatever it may be. It does appear that one former employee or plaintiff (Mr. Moore) who did in 1979 know plaintiff's formulas now works for Koppl. However, it is not shown that 1979 knowledge is relevant. In any event, Mr. Moore denies that he has revealed to Koppl what he does know of the formula and no rebuttle is provided. And, lastly, there is no showing that defendant's sealant is the same as plaintiff's. At the hearing, an expert's report was submitted showing that the sealants are different. It also appears that the various formulations of plaintiff's claims with one exception all depend on breach of duty to plaintiff in the revealing of plaintiff's trade secrets. The non-competition agreements are not enforceable in California. The only item left "alive" is the cause of action for interference by Koppl with the employment contract between plaintiff and Overstreet and Edmon.

Plaintiff requests a more formal set of findings. Defendant to provide form of statement of uncontroverted facts and conclusions in the revised form discussed at the hearing. Pretrial conference continued to May 1, 1987, 1:30 p.m.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos. CV 84-6497 HLH
and CV 84-7741 HLH

TEAM, INC. and LEAK REPAIRS, INC.

Petitioners

v.

OVERSTREET, et al.

Respondents

April 27, 1987

PROCEEDINGS:

Plaintiffs' motion to strike portions of defendant's declaration. Defendant's motion for summary judgment.

ORDER (also, if applicable, findings and memorandum opinion):

The motions for summary judgment on the claims for interference with contract and breach of contract in both cases are granted. There being no other issues undisposed of, summary judgment is granted all defendants in both cases (84-6497 and 84-7741). Defendants to submit form of judgment. This minute order will constitute the court's findings of uncontroverted fact and conclusions.

The court has previously granted 2 motions for summary judgment which disposed of the trade secrets portion of this lawsuit. The allegations that plaintiffs' hardware and the techniques of applying same were stolen trade secrets were removed from the case because the undisputed facts showed

that the hardware was applied in the field and left with the customer, available to anyone in the business to copy, and thus could not be trade secrets. The techniques of application could not be trade secrets because they were done in the full view of anyone watching on the customer's premises and were deducible from later disassembly. The sealant formula and the customer lists, on the other hand, could be trade secrets, but there was a dearth of evidence to show that defendants had or used either. Thus, the heart of the case has been previously decided.

There remains the action for interference with contract against Koppl and Coker, and, to the extent it has not been disposed of before, the breach of contract claims against Overstreet and Edmon. Both Overstreet and Edmon had employment contracts with plaintiffs which were terminable at will. Both quit plaintiffs and accepted employment with Koppl at the invitation of Coker, chief executive of Koppl.

Plaintiffs' allegations are made at several levels: 1. Overstreet and Edmon breached their employment duties while still employees of plaintiffs, 2. Coker and Koppl improperly solicited them to quit plaintiffs and work for Koppl, 3. Overstreet and Edmon took to Koppl and used against plaintiffs various trade secrets, 4. Overstreet and Edmon violated the non-competition clauses of their contracts, and 5. Koppl, through Overstreet, solicited others of plaintiffs' employees to leave and work for Koppl.

The first of the allegations fails for want of proof. *Bancroft-Whitney* (1968) 64 C.2d 327 [sic] does, indeed, make clear that an employee, while still employed, owes full fidelity to the employer and cannot do anything to injure the employer's interests. However, plaintiffs have failed to show that either Overstreet or Edmon did anything contra to plaintiffs' interests while still employed by plaintiffs.

The third claim fails by reason on the previous findings on summary judgment that the items used by Overstreet and

Edmon in competition while working for Koppl were not trade secrets and, therefore, not protected, or that there was no evidence that what could potentially be classified as a trade secret was either taken or used.

The fourth claim founders on California law and public policy as shown by B&P Code § 16600, and the cases interpreting that section. The non-competition provisions of the contracts are flatly unenforceable under California law. Case law makes it clear that the only information a former employee may not use in competition in his new employment are trade secrets. (See, e.g., *American Paper & Packaging Prod.* (1986) 183 C.A.3d 1318, 228 C.R. 713) [sic]. Accordingly, plaintiffs may not enforce their contracts to the extent that they purport *to prevent defendants from working for competitors* and using *non-trade secret information* in competition even if that information was gained while working for plaintiffs.

That leaves the second and fifth claims to consider: whether Koppl may approach plaintiffs' employees and offer jobs while those employees still work for plaintiffs. There is a dispute of fact as to whether Coker, for Koppl, first approached Overstreet and Edmon, or vice versa, and there is evidence to support plaintiffs' contention that Overstreet, after going to work for Koppl, approached Trueil, Anderson, and Hosepian, existing employees of plaintiffs, who later were employed by Koppl. (Koppl also employed Moore, but Moore had not worked for plaintiffs since 1979, and no impediment to hiring him appears.) Here, California law is such that the tort of interference with contractual relations (that is, the employment relationship between Overstreet and Edmon, on the one hand, and plaintiffs on the other) is not made out on the facts posited by plaintiffs. The leading case is *Diodes, Inc.* (1968) 260 C.A.2d 244, 67 C.R. 19 [sic]. More

than hiring away another's employee at will is needed to make out the tort:

> "Even though the relationship between an employer and his employee is an advantageous one, no actionable wrong is committed by a competitor who solicits his competitor's employees or who hires away one or more of his competitor's employees who are not under contract, so long as the inducement to leave is not accompanied by *unlawful action*." (67 C.R. at 25-26.) (Here, "contract" means a contract for a term.)

The reason for the rule is explained:

> "In the employee situation the courts are concerned not solely with the interests of the competing employers, but also with the employee's interests. The interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed any illegal act accompanying the employment change." (67 C.R. at 26.)

And, the "illegal" or "unconscionable" conduct which would lead to liability must be more than that the new employer *can better compete* when aided by the former employee of the competitor.

The only conduct shown by plaintiffs which defendants engaged in was successful competition. That is insufficient to support the tort of interference with contract (or advantageous business relationships). Defendant Koppl was privileged to offer employment to plaintiffs' employee at will in the absence of other wrongful conduct, of which there is no evidence. There is no cause of action *for the ingratitude* of the former employee for the education and knowledge they have received.

Summary judgement is granted. Defendants to provide form of judgment in both cases.

APPENDIX E

United States District Court

CENTRAL DISTRICT OF CALIFORNIA

TEAM, INC., a Texas corporation, and LEAK REPAIRS, INC., a Texas corporation, *Plaintiffs,* vs. **JONATHAN OVERSTREET, an individual, KOPPL COMPANY, a California corporation, M. DOUGLAS COKER, an individual and KOPPL INDUSTRIAL SYSTEMS, a California corporation,** *Defendants.*	Civil Case No. 84-6497 HLH Consolidated with Civil Case No. 84-7741 HLH JUDGMENT
TEAM, INC., a Texas corporation, and LEAK REPAIRS, INC., a Texas corporation, *Plaintiffs,* vs. **JOHN A. EDMON, an individual, KOPPL COMPANY, a California corporation, M. DOUGLAS COKER, an individual, and KOPPL INDUSTRIAL SYSTEMS, a California corporation.** *Defendants.*	

The above entitled consolidated cases were subject [sic] of Summary Judgment Motions filed by the Defendants and heard by the Court on November 17, 1986, February 2, 1987, and April 27, 1987. The Plaintiffs were represented at all hearings by Veronica Gray and the Defendants were represented by Don D. Nelson and Ronald J. Lewis. In connection with each Summary Judgment Motion and its related hearing, both the Plaintiffs and Defendants filed Points and Authorities, declarations and made oral arguments before the court.

IT IS HEREBY ORDERED AS FOLLOWS:

Summary Judgment is ordered in favor of the Defendants for each and every issue and cause of action in this lawsuit.

Plaintiffs shall take nothing against any defendant in either action.

This Court's minute orders for each Summary Judgment Motion hearing will constitute the court's finding of uncontroverted facts and conclusions of law.

Defendants to recover their costs in the sum of $_____. [sic]

Dated: May 27, 1987

/s/ HARRY L. HUPP

Honorable Harry L. Hupp,
Judge

APPENDIX F

Rule 56. Summary Judgment

(c) *Motion and proceedings thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

APPENDIX G

Amendment VII United States Constitution

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

No. 88-393

Supreme Court, U.S.
FILED
SEP 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the Unite

October Term, 1988

TEAM, INC. and LEAK REPAIRS, INC.,

Petitioners,

v.

JONATHAN OVERSTREET, KOPPL COMPANY, M. DOUGLAS COKER, AND KOPPL INDUSTRIAL SYSTEMS,

Respondents.

TEAM, INC. and LEAK REPAIRS, INC.,

Petitioners,

v.

JOHN A. EDMON, KOPPL COMPANY M. DOUGLAS COKER, and KOPPL INDUSTRIAL SYSTEMS,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October, 1988

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No. 88-393

In The

Supreme Court of the United States

October Term, 1988

TEAM, INC. and LEAK REPAIRS, INC.,

Petitioners,

v.

JONATHAN OVERSTREET, KOPPL COMPANY, M. DOUGLAS COKER, AND KOPPL INDUSTRIAL SYSTEMS,

Respondents.

TEAM, INC. and LEAK REPAIRS, INC.,

Petitioners,

v.

JOHN A. EDMON, KOPPL COMPANY M. DOUGLAS COKER, and KOPPL INDUSTRIAL SYSTEMS,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This case comes before the Court on a Petition by Team, Inc. and Leak Repair, Inc., plaintiff-appellant below, for a Writ of Certiorari. At issue is a judgment of the United States Court of Appeals for the Ninth Circuit which affirmed the three summary judgments granted

the Respondents by the United States District Court for the Central District of California. The District Court granted the Respondents' summary judgment by holding that Respondents had not missappropriated any of the Petitioners' trade secrets or interfered with their contractual relations. The opinion of the Ninth Circuit Court of Appeals is unreported according to a note appended thereto which stated, "This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit . . .

STATEMENT OF CASE

In 1984, Respondent Koppl Company, a small 50 year old California company, engaged in the business of working on pipes in oil refineries and chemical plants which contained flowing liquids and gas under pressure, decided to broaden the services they offered to their existing customers by also providing the service of sealing leaks on pipes which are on stream and under pressure (leak sealing). At that time there were two large international companies (one of them the Petitioner) offering leak sealing services worldwide and over ten smaller companies offering the same services on a regional basis in various areas of the United States.

Respondent Koppl, in the course of offering leak sealing to its existing customers, over a period of nine months hired, among others, four employees who previously worked for the Petitioner. Three of those individuals are also Respondents in this matter.

In providing leak sealing to the Respondents' customers, Respondent used the hardware and techniques which were widely used and well known among the many companies engaged in the business of leak sealing. The hardware and techniques were also well known to leak sealing customers. Respondent Koppl had been selling its own leak sealing hardware and sealants since 1982, several years prior to entering the leak sealing service business. The Respondents have produced and used leak sealing techniques, hardware and sealants which were commonly known and used in the industry or were independently researched and developed by Respondents. (See Appendices A, B, C and D of Petitioners' brief).

In response to the Respondents' three summary judgment motions in the District Court, the Petitioners failed to establish the existence of any facts upon which a jury could reasonably conclude that the techniques, hardware, customer list and sealants used by the Respondents were trade secrets.

On June 21, 1988, when the Court of Appeals affirmed the District Court's grant of summary judgment to the Respondents, it did not establish a new standard for summary judgments as alleged by the Petitioners. Petitioners failed their responses to the Respondents' motions to include any material facts which would prove that the Petitioners' alleged trade secrets were in fact secret and were not commonly used by other companies engaged in the leak sealing business. Petitioners further failed to provide the District Court with any material facts which contradicted Respondents' claims that they

independently developed their own methods and customer lists.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari (hereinafter, "Writ") should not be granted, because the decision of the Court of Appeals was consistent with the standard, for Summary Judgment established by the Supreme Court.

1. The Burden.

Petitioners claim that the decision of the Court of Appeals imposes a much higher burden on them than is required under Rule 56 of the Federal Rules of Civil Procedure. (Writ, page 11).

However, Respondents submit, the Petitioners have made the error of considering only paragraph (c) of Rule 56, while ignoring paragraph (e) of Rule 56.

Thus, the combined effect of paragraph (c) *and* paragraph (e) of Rule 56 is to focus attention on the particular burden of proof that the non-moving party must bear at trial as to an element essential to its case.

Therefore, Petitioners have erred in their contention that the Court of Appeal imposed "a much higher burden" by requiring them to establish the existence of facts on an issue prior to trial (Writ, page 5).

The burden obliges the Petitioners to do more than "merely present evidence of a factual dispute."

The arguments of the Respondents are supported by three recent rulings by the Supreme Court which clarify the Summary of Judgment issue and which indicate that the Court has clearly decided not to take a harsh view toward motions for summary judgment.

The decisions in *Celotex Corp. v Catrett*, 477 U. S. 317 (1986); *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 U. S. 574 (1986), and *Anderson v Liberty Lobby, Inc.*, 477 U. S. 242 (1986), as explained and supported by subsequent decisions, illustrate that the arguments of Petitioners are simply wrong, and there is no reason for the Supreme Court to grant this Petition.

2. The Evidentiary Standard.

In addition, the allegation of Petitioners (Writ, page 5) that the Supreme Court has only addressed actions in which the movant presents no evidence to support the motion (citing *Celotex*) is misleading and taken out of context.

The Supreme Court actually stated: "There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Celotex*, at page 323 (emphasis in original). This was cited in *Edwards v Aguillard*, 482 U.S. ___, 96 L. Ed. 2d 510, 527 (1987).

The Supreme Court in *Celotex* said (at page 323) that the motion for summary judgment "may, and should, be granted," regardless of whether the moving party accompanies its motion with affidavits, "so long as whatever is

before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c) is satisfied." The Respondents did in fact submit an abundance of affidavits and other documentary evidence with each of their three summary judgment motions. Therefore the Petitioners' discussion of this issue is superfluous and is an attempt to confuse the issues. Petitioners also seem to be attacking the decisions in *Matsushita* and *Anderson*, by claiming that in those cases "the evidentiary standard exceeds the ordinary preponderance requirement." (Writ, page 5).

This is curious, in view of the fact that those cases were decided by the Supreme Court, the very Court to which the Petitioners are now requesting to review this case. Yet their attacks are limited to the Court of Appeal, and nowhere in the body of the Petition is there a request to the Supreme Court to reverse itself on the decisions in *Matsushita* and *Anderson*. Indeed, much reliance is placed throughout the Writ on *Anderson*, although the Petitioners have intentionally given an erroneous interpretation to attempt favoring their convoluted arguments.

3. No Jury Trial.

In addition, Petitioners are not entitled to a jury trial merely by inferring that they should have one. They failed in their response to the Respondents' summary judgment motions to provide the court with sufficient evidence for the court to send the case to a jury.

ARGUMENTS

I

PETITIONERS HAVE ERRED IN THEIR ANALYSIS OF THE LAW ON SUMMARY JUDGMENT.

1. The Burden.

The Petitioners have made the error of considering only paragraph (c) of Rule 56 (Writ, page 6), while ignoring paragraph (e) of Rule 56.

In reality, the Petitioners have erred in alleging that the non-moving party, in order to show a genuine issue, merely has the burden of submitting *any* evidence "showing the possibility of the existence of certain facts from which it would be open to a jury to infer from the circumstances that the complained-of wrong occurred." (Writ, page 6).

In actual fact, the Supreme Court in *Anderson* said (at pages 247-248) that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for the summary judgment; the requirement is that there be no *genuine* issue of *material* fact (emphasis in original).

It has been said that in so holding, the Supreme Court indicated that the burden upon the moving party is not necessarily one of producing evidence showing the absence of a genuine issue of material fact. Instead, the burden may be discharged by "showing" – that is, "pointing out to the district court" – that there is an absence of evidence to support the non-moving party's case. *Cal-Farm Insurance Co. v United States*, 647 F. Supp. 1083 (E.D. Cal. 1986).

The Respondents clearly showed the District Court that the Petitioners were unable to show their alleged trade secrets were in fact secret.

The Court in *Celotex* continued (at page 248) that the question was whether the evidence was such that a reasonable jury could return a verdict for the non-moving party, and it noted Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment " 'may not rest upon the mere allegations or denials of his pleading, but . . . must set forth *specific facts* showing that there is a genuine issue for trial.' " (Emphasis added).

The Court reaffirmed this principle in *Matsushita* (at page 552).

The District Court and the Court of Appeals found that the Petitioners failed to set forth specific facts showing that trade secrets even existed. They were unable to show that the techniques, hardware, sealants and customer lists which were at issue were not known to the many other companies in the industry. In fact, the Petitioners even stated that they do not know the techniques and hardware used by their competitors. (Court of Appeals record Tab [hereinafter "Tab"] 104, p.263, p.267, p.270).

Thus, the combined effect of paragraph (c) *and* paragraph (e) of Rule 56 (together with the Supreme Court's interpretation) is to focus attention on the particular burden of proof that the non-moving party must bear in a summary judgment motion as to an element essential to its case.

2. The Evidentiary Standard.

The Court in *Anderson* said (at page 249) that there was *no* issue for trial *unless* there was sufficient evidence favoring the non-moving party for a jury to return a verdict for that party (emphasis added).

If the evidence was merely colorable, or was not significantly probative, then summary judgment would be granted. *Anderson,* at pages 249-250.

Petitioners complain (Writ, pages 4-5) that the decision of the Court of Appeal requires a plaintiff whose claim is attacked by a motion for summary judgment to convince the trial court judge of the claims presented. However, the Court in *Anderson,* citing *Improvement Co. v Munson,* 14 Wall 442, 448 (1872), stated as follows (at page 251):

> "Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of this court have established a more reasonable rule, that *in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally not evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."* (Emphasis added).

The Court held that whether the case should even be presented to a jury was guided by the substantive evidentiary standards that applied to the case (at page 255).

The Respondents are not arguing that the judge should engage in credibility determinations or weigh the evidence; and the Petitioners make the mistake of basing their Writ on the argument that the trial judge did that.

In actual fact, the trial Judge was doing no more than that prescribed under Rule 56 and the decisions in *Anderson, Matsushita,* and *Celotex*. The District Court's inquiry was whether the evidence presented a sufficient disagreement to require submission to a jury or whether the Respondents had to prevail on the evidence as a matter of law.

In the present case, the District Court and the Court of Appeals held that the Petitioners had failed to come forward with sufficiently "specific" facts from which to draw reasonable inferences about any material facts of actual and real secrecy which is a necessary element of the claim of the Petitioners.

In *T.W. Elec. Service v Pacific Elec. Contractors,* 809 F.2d 626, 631, f.n.3 (9th Cir.1987) the Court stated that if the statements of the Supreme Court in *Anderson* were construed as requiring a Court to ask whether a jury could find in favor of the non-moving party viewing *all* of the evidence – that presented by both sides – (as Petitioners seem to want the Court to do in the present case) then it would contradict the clear instruction that a Court may not weigh the evidence or assess its credibility.

The Petitioners have avoided the cases of *Celotex* and *Matsushita*. A review of these decisions further bolsters the arguments of Respondents in this case.

In *Matsushita* (at page 538), it was held that whether a genuine issue can be said to exist with respect to a material fact is often a close question. Clearly, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." The Petitioners also failed this test.

Celotex (at page 265) stands for the proposition that if the party moving for summary judgment meets its initial burden of identifying for the Court the portions of the material on file that it believes demonstrates the absence of any genuine issue of material fact, the non-moving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment. Instead, the non-moving party has to set forth specific facts under Rule 56, showing there is a genuine issue for trial. That principle was followed in *Brewer For Brewer v City of El Cerrito*, 666 F.Supp.1346, 1349 (N.D.Cal.1987). The Petitioners also failed this additional test.

In *T.W. Elec. Service v Pacific Elec. Contractors*, 809 F.2d 626, 630 (9th Cir.1987), the Court of Appeal, citing the above propositions, said that the non-moving party may not merely state that it will discredit the moving party's evidence at trial and proceed in the hope that something can be developed at trial in the way of evidence to support its claim.

3. No Right to a Jury Trial.

Petitioners argue that summary judgment impermissibly infringes their right to a jury trial (Writ, page 19), and cite the case of *Poller v Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 467 (1962).

However, *Poller* is distinguished from the present case. In *American Floral Serv. v Florists' Transworld Del.*, 633 F. Supp. 201, 227 (N.D. Ill. 1986), the Court said that *Poller* advised sparing use of summary judgment in anti-trust cases. "But that advice simply reflects the usual factual complexity of anti-trust cases, a situation always calling for caution in summary judgment analysis."

The Court stated: "Now *Matsushita Electric Industrial Co. v Zenith Radio Corp.* (citations) makes plain the *Poller* caveat is only that and not an inexorable mandate." The Court, after discussing *Matsushita,* and *discrediting* the notion that a non-moving party may draw inferences favorable to their contentions and assert that they have thereby presented issues that must be resolved by a jury, stated (at page 227) that "*Poller* merely teaches caution" (citation), and "if there is no genuine issue of material fact, and if the resisting party does not present a record sufficient to support a reasonable finding in his favor, a district court has a duty to grant the motion of summary judgment." (citation).

Respondents submit, in a case such as the present case, where the issues are not as complex as those in an anti-trust suit, *Poller* has very little significance. Moreover, the Petitioners cannot merely draw an inference that they are entitled to a jury trial, especially when their claimed trade secrets are not trade secrets at all, and both the District Court and Court of Appeals recognized that there could not be a reasonable finding in Petitioners favor based on the affidavits and other insignificant documentary evidence they filed with the District Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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